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KARL MORELL



February 9, 2004

210038

BY HAND DELIVERY

ENTERED
Office of Proceedings

The Honorable Vernon Williams
Surface Transportation Board
1925 K Street, N.W., Suite 700
Washington, DC 20423-0001

FEB - 9 2004

Part of
Public Record

Re: STB Docket No. AB-33 (Sub-No. 132X), Union Pacific Railroad
Company -- Abandonment Exemption -- In Rio Grande and
Mineral Counties, CO

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Motion to Strike of
Adjacent Land Owners.

Please time and date stamp the extra copy of the Motion and return it with
our messenger.

If you have any questions, please contact me.

Sincerely,

Karl Morell

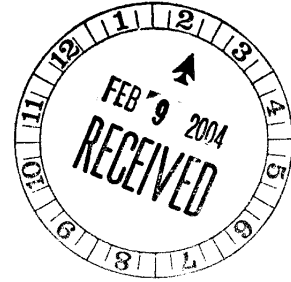
Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-33 (SUB-NO. 132X)

UNION PACIFIC RAILROAD COMPANY
-- ABANDONMENT EXEMPTION --
IN RIO GRANDE AND MINERAL COUNTIES, CO

MOTION TO STRIKE



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Attorney for:
The Adjacent Land Owners

Dated: February 9, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-33 (SUB-NO. 132X)

UNION PACIFIC RAILROAD COMPANY
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MOTION TO STRIKE



Elk Creek Ranch, Inc. and Wason Ranch Corporation (the "Coalition") hereby move to strike the "REBUTTAL OF ADJACENT LANDOWNERS' STATEMENT", attached as Appendix DHS-8, to the Reply in Opposition to Petition to Reopen Decision Served May 11, 1999, filed by Denver & Rio Grande Railway Historical Foundation ("D&RG") on January 20, 2004.

BACKGROUND

On April 2, 1999, D&RG filed an offer of financial assistance ("OFA") with the Surface Transportation Board ("Board") in this proceeding. Attached to the OFA were: (1) D&RG's purported Statement of Financial Condition, as of November 30, 1998; (2) a pledge by the president of D&RG, Donald H. Shank ("Mr. Shank"), to donate \$400,000 to D&RG; and (3) the purported Statement Of Financial Condition of Mr. Shank. The Financial Statements were not verified or submitted under oath. Indeed, not a single statement of fact contained in the OFA was verified by Mr. Shank or any other official of D&RG. By decision served May 11, 1999, the Board found D&RG to be financially responsible. In so doing, the Board necessarily relied on the veracity of the information contained in the Financial Statements submitted by D&RG.

On October 14, 2003, the City of Creede ("Creede") filed its petition to reopen this proceeding ("Petition") and the Coalition filed Comments in Support on December 19, 2003. On January 20, 2004, D&RG and the Union Pacific Railroad Company ("UP") filed separate Replies to the Petition. Only D&RG's Reply addresses the Coalition's Comments.

ARGUMENT

D&RG's Reply consists of three parts: (1) a 16-page pleading signed by counsel; (2) a four-page Verified Statement of Mr. Shank; and (3) a 14-page statement by Mr. Shank that was not filed under oath.

The 14-page statement of Mr. Shank has no signature and is not notarized. Consequently, that statement should be stricken on grounds that it is in violation of 49 C.F.R. 1104.4, 1104.5, 1112.6 and 1112.8. Under the Board's Rules of Practice, all evidence filed under the Modified Procedures must be verified. 49 C.F.R. Part 1112. See *Pinto Trucking Serv., Inc. v. Cape Air Frt., Inc.*, 357 I.C.C. 197, 202 (1977) (Factual statement appended to attorney's opening statement stricken because it was not verified).

The submission of unverified material is particularly troubling in this proceeding. The Board's finding that D&RG is a "financially responsible" person was based solely on unverified financial information submitted to the Board by D&RG and Mr. Shank. As the documents submitted by Creede unequivocally demonstrate, virtually the entire financial information submitted with the OFA is false, fictitious or fraudulent. D&RG and Mr. Shank had another opportunity in the Reply to present this Board with credible financial data submitted under oath to substantiate that D&RG was a financial responsible entity at the time of the OFA filing. The fact that they chose not to speaks volumes. The is left with a record in this proceeding devoid of any credible evidence from which the Board could affirm its prior, fraudulently induced findings as to the financial capabilities of D&RG.

The 16-page document prepared by D&RG's attorney is signed and thus considered properly verified pursuant to 49 C.F.R. 1104.4(a). That document, however, consists mainly of irrelevant and erroneous arguments.¹ In only one respect does this document attempt to address the false information contained in the Financial Statements. Citing to Mr. Shank's Verified Statement, it is alleged that the absence of fraud is conclusively shown by the \$506,028 contribution made to D&RG by Mr. Shank. The allegation, however, conveniently ignores the pervasive fraud contained in the Financial Statements. In any event, as next explained, this attempt to mask the fraud is apparently based on further false information.

In his 4-page Verified Statement, Mr. Shank totally ignores the numerous documents filed by Creede which conclusively demonstrate the pervasive fraud perpetrated on the Board by the OFA filing. Instead, Mr. Shank seeks to have the Board excuse his prior unlawful conduct by claiming to have contributed \$506,028 to D&RG, which is an amount in excess of his \$400,000 pledge in the OFA. The Coalition understands that Creede is filing evidence which refutes Mr. Shank's claims.²

¹ For example, it is argued that: (1) only fraud demonstrated within one year of judgment is actionable, yet the Board's governing statute permits the Board to change an action induced by fraud at any time [49 U.S.C. 722(c)]; (2) there was no fraudulent misrepresentation because the Board relied on the entire financial statement and not the false components, yet the purported non-fraudulent components remain unidentified [*But see, In Re Weckstein*, 314 I.C.C. 75, 80 (1961) (Even though most of the testimony was true, the false part still constituted perjury)]; and (3) D&RG's only financial representation to the Board was its ability to pay \$387,930. In this latter regard, it is argued that the remaining false components which presumably would have covered the balance of the purchase price and rehabilitation costs -- had those components not been false -- must be ignored by the Board. Aside from being legally incorrect, the argument must fail because it does not identify the non-fraudulent component of the Financial Statements submitted in the OFA.

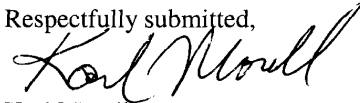
² Not only is Mr. Shank's contribution claim apparently false, it is also unsubstantiated, not relevant to the evidence of fraud contained in the Petition and contrary to his prior testimony under oath. Mr. Shank cites to Appendix DHS-3 as substantiation of his claimed contribution. The Verified Statement of D&RG's bookkeeper, however, does not specify what amount Mr. Shank contributed to D&RG. In the OFA, Mr. Shank pledged to donate \$400,000 in cash to be used to pay UP. The evidence of record clearly demonstrates that Mr. Shank contributed only \$100,000 in cash. In his August 3, 2001 deposition, Mr. Shank, under oath, admitted that he had

The bulk of D&RG's Reply consists of the 14-page, single-spaced unsigned and unverified statement of Mr. Shank. Interestingly, it is only in this unverified statement that Mr. Shank addresses the evidence filed by Creede and the Coalition. Mr. Shank's unwillingness to include the assertions concerning the Financial Statements in his Verified Statement or to file those assertions under oath raises serious questions as to their veracity. A review of the record in this proceeding, which is comprised largely of documents produced by Mr. Shank in discovery, offers an answer. The unverified statement appears to perpetuate the fraud contained in the OFA. For example, Mr. Shank seeks to explain away D&RG's inability fully to pay UP for the Creede Brand and to rehabilitate the line because in late 1999 he lost \$80,000 in an alleged "ponzi scheme". Yet, according to the Financial Statements submitted to the Board, Mr. Shank would still have had a net worth of \$1,511,169 after the \$80,000 loss. Mr. Shank seeks to trivialize the false information contained in the Financial Statements by stating that some mistakes were made. Mr. Shank blames the "significant discrepancy" between the assets listed with the Board and those filed with the IRS on an IRS audit that forced the corrections to the schedule. Mr. Shank, however, did not see fit to inform the Board of the errors.

not made the \$400,000 contribution to D&RG and that he was not in a financial position to do so. See Creede Documents at 241-42. Mr. Shank would now have the Board believe that within 5 months of the deposition his financial position miraculously improved and he was able to contribute an additional \$406,028.

In summary, the Coalition respectfully requests that the Board strike Appendix DHS-8 on grounds that it is not verified.

Respectfully submitted,



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Attorney for:
The Adjacent Land Owners

Dated: February 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing Motion To Strike on the following parties of record in this proceeding, by first-class mail, postage prepaid:

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February 9, 2004